Supreme Court, U. S.
FILED
MAY 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1187

JOSEPH BAXTER, et al
Petitioner

-vs-

NICHOLAS A. PALMIGIANO
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

I. Opinion Below

The opinion of the United States Court of Appeals for the First Circuit rendered December 20, 1974, is affixed to Petitioners' Petition for Writ of Certiorari as Appendix A, p. 10.

II. Jurisdiction

The Respondent does not contest the Petitioners' jurisdictional statement (Petition for Writ of Certiorari, p.2) but hastens to add that the Rhode Island prison officials who seek the issuance of a Writ of Certiorari go considerably outside the record and the decision of the United States Court of Appeals for the First Circuit in stating the facts and the issues they seek to have reviewed. This point will be discussed below.

III. Questions Presented

1. Whether a prisoner is entitled to the presence of counsel at an in-prison disciplinary hearing when the facts which gave rise to the disciplinary hearing may also give rise to a criminal prosecution.

McKINNON & FORTUNATO
ATTORNEYS AT LAW
1150 NEWPORT AVENUE
PAWTUCKET, R. I. 02861

2. May a State prisoner, under the Fifth and Fourteenth Amendments to the United States Constitution, remain silent in the face of interrogation at a prison disciplinary hearing, without having his silence used against him at that time or in future proceedings.

IV. Statement of Facts and Travel of Case

This matter has been before the United States Supreme Court on a previous occasion. Joseph Baxter, et al v Nicholas A. Palmigiano, October term, 1973, No. 73-1247. The matter was remanded to the United States Court of Appeals for reconsideration in light of this Court's decision in Wolff v McDonnell, 418 U.S. 539 (1974). After receiving additional legal memoranda from counsel and reviewing the case pursuant to the remand, the United States Court of Appeals for the First Circuit rendered its decision on December 20, 1974, the Slip Opinion of which decision is affixed to petitioner's Petition for a Writ of Certiorari as Appendix A.

In seeking to have this Court review the decision of the United States Court of Appeals, the petitioners have in several instances gone well outside the evidence and record in the case. Your respondent, Nicholas A. Palmigiano, a prisoner under life term at the Adult Correctional Institutions in Howard, Rhode Island, stresses that there is nothing in the record to support the assertion of the petitioners made at Page 3 of their petition that the system of disciplinary procedures in effect under the order entered in Morris v Travisono, 310 F. supp. 857 (D.R.I. 1970) "operated with great difficulty for three years". Nor does the record show, nor was any evidence ever offered at the trial of this matter tending to show, that "almost all disciplinary hearings involved possession of weapons, drugs, assaults, and matters which can also be subject of criminal prosecution...", or that "[f]ollowing Baxter II, defense counsel has been supplied at every disciplinary hearing. The hearing officer is now over two-hundred cases

behind, whereas before Baxter II the backlog never exceeded thirty cases." Petitioner's Petition for Writ of Certiorari, p. 7.

Additionally, in their statement of facts, your petitioners declared that prisoner Palmigiano "was advised by a Deputy Warden that he had the right to remain silent during the hearing," Petition for Writ of Certiorari, p. 3, but the petitioners failed to add that the Deputy Warden informed Palmigiano that his silence would be used against him. This fact was not overlooked by the United States Court of Appeals for the First Circuit in its decision. Slip Opinion, Petition for Writ of Certiorari, Appendix A, p.11. The Court of Appeals also noted another significant fact, namely that "the inmate was specifically advised that the facts giving rise to the disciplinary hearing could also lead to State prosecution..." Slip Opinion, Petition for Writ of Certiorari, Appendix A, p.11.

In short, your respondent submits that the legally significant facts to be considered by this COURT and which in fact are supported by the record and were considered by the United States Court of Appeals in Palmigiano v Baxter, 487 F. 2d 1280 (1973), and the Slip Opinion of December 20, 1974, Supra, are that Palmigiano was charged with an in-prison rule violation on a set of facts that could also give rise to a criminal charge and then denied the presence of counsel when brought before a disciplinary board for an inquiry into the violation, which inquiry also included the putting of questions to prisoner Palmigiano.

This matter was brought for an individual and not as a class action, and the United States Court of Appeals treated it as such; the references by the petitioners to general prison conditions and disciplinary proceedings go beyond the record and, in any event, are totally irrelevant to the narrow issue in this case.

McKINNON & FORTUNATO
ATTORNEYS AT LAW
166 DEPORT AVENUE
PORTLAND, R. I. 02907

V. Argument

1. Inasmuch as the holding in Wolff v McDonnell, 418 U.S. 539 (1974) does not in any way vitiate the holdings in Mathis v United States, 391 U.S. (1968) and Miranda v Arizona, 384 U.S. 436 (1966), the United States Court of Appeals for the First Circuit has not rejected precedent or reached a novel conclusion by declaring that a prisoner, at an in-prison disciplinary proceeding involving a factual situation that could lead to future criminal prosecution, may invoke the Fifth Amendment privilege against self-incrimination and may have the assistance of counsel during an interrogation process that happens to be coincidental with a disciplinary hearing.

There can be no dispute that a prisoner under sentence for one crime is to be afforded the so-called Miranda protections when being questions by law enforcement officials regarding a separate and unrelated offense. Mathis v United States, 391 U.S. 1 (1968). Numerous decisions of this Court have made it clear that the Fifth Amendment privilege applies to numerous varieties of governmental proceedings and that a person to whom possibly self-incriminatory questions are put may remain silent rather than speculate as to the efficacy of suppression at a later date. See, e.g., Maness v Meyers, - U.S. - 42 L.Ed. 2d 574 (1975); Lefkowitz v Turley, 414 U.S. 70 (1973); Kastigar v U.S., 406 U.S. 441 (1972); McCarthy v Arndstein, 266 U.S. 34 (1924).

There is no indication in Wolff, Supra., that the prisoners involved in that matter faced any future criminal prosecutions, and for this reason, the Court of Appeals quite correctly declared that Wolff was not applicable to Palmigiano's situation. The Court spoke of the duties prison officials must discharge when a prisoner faces possible criminal prosecution from a violation of prison regulations:

> They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain

silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because Wolff requires it in that proceeding, but because Miranda requires it in light of future criminal prosecution. Slip Opinion, Petition for Writ of Certiorari, Appendix A, p. 14.

2. The United States Court of Appeals for the First Circuit deferred to Wolff and abandoned its prior holding on "use" immunity.

At Section III, page 8 of their Petition, petitioners suggest that the United States Court of Appeals for the First Circuit has adopted a unique method involving "use" immunity to protect the interests of prisoners at disciplinary hearings. Prisoner Palmigiano respectfully submits that the Court of Appeals for the First Circuit candidly and clearly rejected "use" immunity as a protective devise in the prison disciplinary hearing context:

> ... we now realize that allowing prison officials to coerce testimony where they wish by extending immunity has awesome implications. It cheapens the Fifth Amendment. Immunity could be given where it would be scant recompense for the consequences of coerced testimony. There is also the institutional problem. Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior opinion did not take such considerations into account.
>
> While reaffirming our holding as to appellant, we amend our prior opinion by withdrawing our declaration as to a general right on the part of the prison authorities to compel testimony and a general right on the part of inmates to "use" immunity when they come before disciplinary boards. Slip Opinion, Petition for Writ of Certiorari, Appendix A, p. 13.

VI. Conclusion

Your respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Stephen J. Fortunato, Jr.
McKINNON & FORTUNATO
1168 Newport Ave.
Pawtucket, R.I. 02861